

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

MICHIGAN REGIONAL COUNCIL OF
CARPENTERS JOINT FRINGE BENEFIT
FUNDS (a/k/a Detroit Carpenters Fringe
Benefit Funds),
MICHIGAN REGIONAL COUNCIL OF
CARPENTERS ANNUITY FUND,
CARPENTERS PENSION TRUST
FUND—DETROIT AND VICINITY,
CARPENTERS VACATION
FUND—DETROIT AND VICINITY
and RESIDENTIAL CARPENTERS LOCAL
UNION NO. 1234 APPRENTICESHIP FUND,

Plaintiffs,

vs.

Case No. 2005-4360-CK

HARTFORD FIRE INSURANCE COMPANY,
a Connecticut corporation;
and FRANK REWOLD & SON, INC.,
a Michigan corporation;

Defendants.

OPINION AND ORDER

The parties have filed competing motions for summary disposition.

I. BACKGROUND

Plaintiffs Michigan Regional Council of Carpenters Joint Fringe Benefit Funds (a/k/a Detroit Carpenters Fringe Benefit Funds), Michigan Regional Council of Carpenters Annuity Fund, Carpenters Pension Trust Fund—Detroit and Vicinity, Carpenters Vacation Fund—Detroit and Vicinity, and Residential Carpenters Local Union No. 1234 Apprenticeship Fund filed this action on October 31, 2005 asserting they are jointly-trusted funds.



Plaintiffs aver defendant Hartford Fire Insurance Company issued a Payment Bond on April 26, 2002 as surety for the Clinton-Macomb Library project on which defendant Frank Rewold & Son, Inc. was the principal contractor. In pertinent part, the Payment Bond obligated defendants Hartford Fire Insurance and Rewold & Son to guarantee and/or make payment for labor and materials furnished by subcontractors on the project.

Plaintiffs contend defendant Rewold & Son subcontracted with Focal Point, Ltd. for labor on the project. Focal Point subcontracted with Millworks, Inc. for the labor of which \$30,318.24 remains unpaid for the period between September 17, 2003 and February 2004. This amount represents fringe benefits required by a collective bargaining agreement that Millworks entered with Interior Systems Local 1045 of the Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

Plaintiffs claim the work was first performed within 30 days of their having served a Notice of Furnishing on defendant Rewold & Son by certified mail on October 16, 2003. Plaintiffs also served a written Notice of Claim dated December 18, 2003 on defendant Rewold & Son and the Clinton-Macomb Public Library by certified mail, service that occurred within 90 days of the last date of furnishing labor. However, the \$30,318.24 remains unpaid.

Accordingly, plaintiffs' Second Amended Complaint apparently alleges Breach of Contract.

The parties now move for summary disposition.

II. STANDARDS OF REVIEW

In reviewing a motion under MCR 2.116(C)(7), a court will accept the allegations of the complaint as true unless contradicted by documentary evidence. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). The reviewing court must consider any affidavits,

depositions, admissions and other documentary evidence submitted by the parties that would be admissible as evidence at trial. *Id.*

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim and must be decided on the pleadings alone; all well-pled facts and reasonable inferences drawn therefrom are taken as true. The motion should be denied unless the claim is clearly so unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Markis v Grosse Pointe Park*, 180 Mich App 545, 551; 448 NW2d 352 (1989).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The reviewing court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it in the light most favorable to the nonmoving party. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). The nonmoving party must proffer evidence establishing a material issue of disputed fact exists for trial to avoid summary disposition. *Id.*

III. ANALYSIS

A. Defendants' Motion for Summary Disposition

As a preliminary matter, plaintiffs are claimants entitled to pursue a claim under MCL 129.206 for unpaid fringe benefits. See *Trustees for Michigan Laborers' Health Care Fund v Seaboard Surety Co*, 137 F3d 427 (CA 6, 1998), relying on *United States ex rel Sherman v Carter*, 353 US 210, 216; 77 S Ct 793; 1 L Ed 2d 776 (1957); compare also *Williamson v Williams*, 262 Mich 401; 247 NW 704 (1933).

1. Payment

The Payment Bond provides in pertinent part:

1. The Contractor and the Surety, jointly and severally, bind themselves...to the

Owner to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract....

* * *

3. With respect to *Claimants*, this obligation shall be null and void if the Contractor promptly *makes* payment, directly or indirectly, for all sums due. [Emphasis added.]

The meaning of this provision is unclear.

To the extent this provision means neither defendant Hartford Fire Insurance nor defendant Rewold & Son have any obligation once defendant Rewold & Son promptly pays a claimant, the provision would merely be commonsense: any obligation would be discharged upon proper payment.

To the extent defendants Hartford Fire Insurance and Rewold & Son—proffering evidence that (1) Brian J. Samko, Focal Point's vice-president, testified Focal Point was paid in full, (2) Focal Point signed a "Final Unconditional Waiver" dated April 27, 2004 also stating it was paid in full (a fact that plaintiffs do not dispute) and (3) Focal Point paid Millworks (which plaintiffs also concede)¹—would read this provision to absolve themselves of any obligation because defendant Rewold & Son indirectly paid the claimants by paying Focal Point, the provision would be void as contrary to basic surety law that recognizes employees and sub-subcontractors can bring claims against a surety when they have not been paid by a subcontractor. See, e.g., MCL 129.206 and 129.207; *W T Andrew Co, Inc v Mid-State Surety Corp*, 450 Mich 655; 545 NW2d 351 (1996); *Williamson, supra*; *Davy Fuel & Supply Co v S R Ratcliffe Plastering Co*, 260 Mich 276; 244 NW 472 (1932) and *Bellware v Wolffs*, 154 Mich App 715, 718; 397 NW2d 861 (1986), citing *Cashin v Pliter*, 168 Mich 386; 134 NW 482 (1912). Indeed, defendants Hartford Fire Insurance and Rewold & Son's interpretation would essentially eliminate the need for surety bonds.

Therefore, defendant Rewold & Son's payment to Focal Point does not defeat plaintiffs' claims.

2. Statute of limitation

The Payment Bond also provides in pertinent part:

11. No suit or action shall be commenced by a Claimant under this Bond...after the expiration of one year from the date (1) on which the Claimant gave the notice required by Subparagraph 4.1 or Clause 4.2.3, or (2) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

* * *

13. When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein.

* * *

MODIFICATIONS TO THIS BOND ARE AS FOLLOWS:

This bond is given in compliance with and subject to all of the provisions of Michigan Public Act No. 213 of the Public Acts of 1963, as amended. All time limitations, notice requirements and definitions and other terms of said Act are applicable here and in executing this Bond, Surety does not waive any of such provisions.

MCL 129.209 provides a one-year statute of limitation from the date on which final payment is made to the general contractor. Under the plain language of the Payment Bond, this statute of limitation is incorporated into the Payment Bond although not expressed therein. See also *Williamson, supra* at 403-407.

Plaintiffs have proffered evidence that final payment was made to defendant Rewold & Son by a check dated November 2, 2004. Plaintiffs filed this action on October 31, 2005, less than one year later.

¹Significantly, plaintiffs go so far as to argue Focal Point and Millworks were joint employers of the workers, and that Millworks is an alter ego of (i.e., is essentially the same company as) or just the payroll division of Focal Point.

Therefore, plaintiffs' complaint is not time barred.

3. Notice

MCL 129.207 provides in pertinent part:

A claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless (a) he has within 30 days after furnishing the first of such material or performing the first of such labor, served on the principal contractor a written notice, which shall inform the principal of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials, and (b) he has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

The plain language of MCL 129.207(a) makes the service of a notice of furnishing a prerequisite to the filing of an action on a payment bond. *Charles W Anderson Co v Argonaut Ins Co*, 62 Mich App 650, 651-654; 233 NW2d 691 (1975) (requiring rigid application of the notice requirements of MCL 129.207 as a condition precedent to recovery on a bond). While plaintiffs would argue against inclusion of MCL 129.207 into the Payment Bond, plaintiffs successfully argued for the inclusion of MCL 129.209 into the Payment Bond; plaintiffs can not—especially in light of *Williamson, supra*, and the incorporating language of the Payment Bond—have it both ways. Contrast *Royalite Co v Federal Ins Co*, 184 Mich App 69; 457 NW2d 96 (1990).

The record establishes Millworks had employees furnishing labor in May 2003. However, plaintiffs did not serve a Notice of Furnishing until October 16, 2003. Hence, plaintiffs clearly did not provide the required notice within 30 days after first performing labor.

Therefore, plaintiffs are precluded by MCL 129.207(a) from bringing an action upon the Payment Bond.

B. Plaintiffs' Motion
for Summary Disposition

Having failed to satisfy a condition precedent to maintaining this action, plaintiffs are not entitled to summary disposition.

IV. CONCLUSION

For the reasons set forth above:

A. Defendants Hartford Fire Insurance Company and Frank Rewold & Son, Inc.'s motion for summary disposition is GRANTED under MCR 2.116(C)(10) and

B. Plaintiffs Michigan Regional Council of Carpenters Joint Fringe Benefit Funds (a/k/a Detroit Carpenters Fringe Benefit Funds), Michigan Regional Council of Carpenters Annuity Fund, Carpenters Pension Trust Fund—Detroit and Vicinity, Carpenters Vacation Fund—Detroit and Vicinity, and Residential Carpenters Local Union No. 1234 Apprenticeship Fund's motion for summary disposition is DENIED as moot.

Accordingly, plaintiffs' complaint is DISMISSED, with prejudice. MCR 2.116(I)(1).

This *Opinion and Order* resolves the last pending claim in this matter and closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

EDWARD A. SERVITTO
CIRCUIT JUDGE

AUG - 1 2006

A TRUE
CARMELLA SABAUGH, COUNTY CLERK
BY: [Signature]

EDWARD A. SERVITTO, JR., Circuit Court Judge

Date:

Cc: Craig Zucker and Diamme Ruhlandt, Attorneys for Plaintiffs

John Staran and Hafeli Staran Hallahan, Attorneys for Defendants